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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RAY SAYER and KORI SAYER, husband and wife, Plaintiffs/Appellants, v. THE STATE OF ARIZONA, a political entity, Defendant/Appellee.	2 CA-CV 2012-0168 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CV2009-317

Honorable Peter J. Cahill, Judge

AFFIRMED

Rabb & Rabb, PLLC
By Lloyd L. Rabb III and Matthew L. Rabb — Tucson

and

Cohen Law
By Steven A. Cohen — Scottsdale
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Thomas C. Horne, Arizona Attorney General
By Fred Zeder — Phoenix
Attorney for Defendant/Appellee

M I L L E R, Judge.

¶1 Ray and Kori Sayer (the Sayers) appeal from a judgment in favor of the State of Arizona after a jury trial on the Sayers' highway negligence claim. The case arose from Ray's night-time motorcycle collision with a disabled elk that had been struck by another vehicle and was lying in the roadway.[1] The Sayers argue the trial court erred in admitting evidence of the state's plans and efforts to prevent similar accidents on other roadways in Arizona. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the evidence and all reasonable inferences from that evidence in the light most favorable to upholding the jury's verdict. *See Hutcherson v. City of Phoenix*, 192 Ariz. 51, ¶ 13, 961 P.2d 449, 451 (1998). The accident occurred in September 2008, on State Route 260 (SR 260) at milepost 253.8. Ray Sayer sustained serious injuries.

¶3 The Sayers' complaint alleged negligent failure by the state to maintain a safe highway.[2] After a ten-day trial, the jury found in favor of the state. This timely appeal followed entry of judgment.

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[1]The Sayers also named as defendants the driver of the vehicle that first struck the elk, Dan Utz, and his wife but dismissed them with prejudice after a settlement.

[2]The state acknowledged its general duty to keep the roadways safe for the traveling public, *see Coburn v. City of Tucson*, 143 Ariz. 50, 52, 691 P.2d 1078, 1080 (1984), and conceded that the collision between the motorcycle and the elk caused Ray Sayer's injuries.

Discussion

¶4 On appeal, the Sayers contend the trial court erred in admitting the following evidence over their objections asserted in pre-trial motions and at trial: an elk-vehicle collision remediation project on Interstate 17 (I-17); wildlife-vehicle collision research throughout the state; elk-vehicle collision remediation projects on SR 260, east of the scene of the accident; and the cost per mile of the projects on SR 260. They argue the evidence was irrelevant and lacked foundation; further, even if relevant, its probative value was outweighed by unfair prejudice and the tendency to mislead or confuse the jury. The Sayers also argue this was inadmissible character evidence.

¶5 We will not disturb a trial court's ruling to admit evidence absent a clear abuse of discretion and resulting prejudice. *Pima Cnty. v. Gonzalez*, 193 Ariz. 18, ¶ 14, 969 P.2d 183, 187 (App. 1998). The abuse of discretion standard "does not mean that the trial court is free to reach any conclusion it wishes. . . . [But,] where there are opposing equitable or factual considerations, we will not substitute our judgment for that of the trial court." *State v. Chapple*, 135 Ariz. 281, 296, 660 P.2d 1208, 1223 (1983). In addition, a trial court abuses its discretion if it commits an error of law in reaching a discretionary conclusion or it does not consider the evidence, or there is no substantial basis for a discretionary finding. *Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, 455-56, 652 P.2d 507, 528-29 (1982).

¶6 The scope of relevant evidence is determined by whether facts proved by the evidence are "of consequence in determining the action." Ariz. R. Evid. 401(b);

Yauch v. S. Pac. Transp. Co., 198 Ariz. 394, ¶ 19, 10 P.3d 1181, 1188-89 (App. 2000); *see also Newell v. Town of Oro Valley*, 163 Ariz. 527, 530, 789 P.2d 394, 397 (App. 1990). Here, liability turned on whether SR 260 was reasonably safe at milepost 253.8. The Sayers presented testimony by Colorado wildlife biologist Dale Reed regarding the behavior of elk and other cervidae,[3] fencing to keep cervidae off highways, and warning signage about cervidae. They also presented testimony by Dr. Robert Bleyl, a highway transportation engineer. In addition to testimony about fencing and signage, Dr. Bleyl opined about the many factors that must be considered by state engineers to make a highway safe. In formulating their opinions, both experts relied upon their advanced academic training, job experience in their home states, published studies, and national guidelines.

¶7 The Sayers' relevance and foundation objections relate to several topics. The first topic concerned an elk-vehicle accident remediation project on I-17 near Munds Park. The project was first referred to in the Sayers' case-in-chief when Reed explained that the type of fence he had recommended for milepost 253.8 was "the same type of fence that's been put in on I-17 at Munds Park." He also used the project to opine that the state could have used electromats,[4] such as those used "in the area of I-17." Additionally, the Sayers did not object to the admission of an exhibit depicting the "I-17

[3]Cervidae are all the species of deer, elk, red deer of Europe, and moose.

[4]An electromat is used at on- and off-ramps, or other openings to the road or highway, where fences are not feasible.

Munds Park Wildlife Fencing Enhancement Project" during Reed's testimony. Dr. Bleyl also testified about the I-17 Munds Park project.

¶8 Because the Sayers introduced the evidence regarding the Munds Park project, the state had the right, on cross-examination and through its experts, to respond on the same subject. *Cf. Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984) (even improper evidence, once introduced, grants opposing party the opportunity to respond); *see also* 1 Morris K. Udall et al., *Arizona Law of Evidence* § 11, at 11 (2d ed. 1982). Although the Sayers acknowledge their expert first introduced the Munds Park evidence, they contend they proffered the evidence for a limited purpose, in contrast to the state's use, which they characterize as lacking foundation. We conclude the relevance and foundation of the Munds Park evidence is the same regardless of which party proffered the testimony.

¶9 The Sayers also contend the testimony about the Munds Park project was irrelevant as it pertained to the amount of time and effort expended and how that road was selected for remediation. Whether remediation measures available to the state are "easy to take or difficult or expensive" is a relevant factor for the trier of fact to consider in determining whether the state has acted negligently. *Markowitz v. Ariz. Parks Bd.*, 146 Ariz. 352, 357, 706 P.2d 364, 369 (1985), *superseded on other grounds by statute*, 1983 Ariz. Sess. Laws, ch. 82, § 1. Again, by first introducing the evidence through their experts, the Sayers established the scope of relevance. Dr. Bleyl opined that a transportation engineer does not limit safety to a particular portion of the highway, but

must consider "their whole roadway system . . . not talking about [SR] 260 but, you know, statewide." The trial court therefore did not abuse its discretion by permitting the state to introduce Munds Park project evidence showing how fencing and electromats were used with preexisting underpasses to allow the elk to cross the road.

¶10 The second claim of error concerns accident rates and studies of potential remediation measures on other highways. In another case involving an elk-vehicle collision, we suggested such evidence would be relevant, stating, "A jury could . . . reasonably conclude that the state had breached its duty of reasonable care based on, among other things, the additional measures taken to prevent the same harm in an area that presented only about half the risk." *Booth*, 207 Ariz. 61, ¶ 11, 83 P.3d at 66. As one of the state's experts explained in this case, traffic engineers compare accident rates on various roadways to determine whether one roadway is reasonably safe. Testimony from the Sayers' experts included wildlife accident studies from Colorado, Utah, British Columbia, and Sweden. The trial court did not abuse its discretion in allowing the state's experts to testify about wildlife-vehicle accident rates and studies from other roads.

¶11 The Sayers also contend that evidence regarding the cost of elk-vehicle collision remediation measures at a location east of milepost 253.8 was irrelevant. Those measures included underpasses, elk jumps, bridges, and animal-activated crosswalks. The state's cost evidence established that a particular remediation might be effective but cost-prohibitive. The evidence was proffered, in part, to respond to Dr. Bleyl's testimony that in his opinion, additional elk warning signs were cost-effective. Dr. Bleyl compared

the cost of signs with the "$50 million [the state] is spending up in the canyon east of Payson." As with the Munds Park project evidence, it was appropriate for the state to respond to the Sayers' cost testimony; furthermore, the evidence was relevant to the determination of the whether the state had acted reasonably or had been negligent. *See Markowitz*, 146 Ariz. at 357, 706 P.2d at 369; *see also Vegodsky v. City of Tucson*, 1 Ariz. App. 102, 106, 399 P.2d 723, 727 (1965) (city's appropriations for street maintenance not admissible, but "testimony tending to establish that the cost of particular preventative measures would have been unreasonably high" is admissible); *Walden v. State*, 818 P.2d 1190, 1194-95 (Mont. 1991) (practicability and cost of protecting against injury valid considerations in determining "reasonableness" even where financial feasibility defense unavailable). We conclude the trial court did not abuse its discretion in admitting remediation costs for a nearby area of SR 260 on the issue of whether the state had acted reasonably by not incurring the same costs in the area of the Sayers' accident.

¶12 The Sayers also contend the remediation evidence should have been precluded pursuant to Rule 403, Ariz. R. Evid. Relevant evidence may be excluded if "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Ariz. R. Evid. 403; *see also Yauch*, 198 Ariz. 394, ¶ 25, 10 P.3d at 1190. "'The greater the probative value . . . and the more significant in the case the issue to which it is addressed, the less probable that factors of prejudice or confusion can

substantially outweigh the value of the evidence.'" *Shotwell v. Donahoe*, 207 Ariz. 287, ¶ 34, 85 P.3d 1045, 1054 (2004), *quoting State v. Gibson*, 202 Ariz. 321, ¶ 17, 44 P.3d 1001, 1004 (2002). We grant substantial discretion to the trial court's weighing process "[b]ecause 'probative value' and 'the danger of unfair prejudice' are not easily quantifiable factors." *Hudgins v. Southwest Airlines Co.*, 221 Ariz. 472, ¶ 13, 212 P.3d 810, 819 (App. 2009).

¶13 The Sayers argue the remediation evidence had minimal probative value against the danger the jury could have been confused or misled "to use the evidence for an improper reason, such as determining the reasonableness of the State's roads and its conduct generally." They also contend that with the testimony of the high costs of the construction projects, "[t]he only conclusion that could be reached by the jury is that the State would incur significant cost to make SR 260 at and near [milepost 253.8] reasonably safe. A cost, during this time of economic hardship, talk of austerity that the State and its residents would have to pay."

¶14 In response to the Sayers' Rule 403 arguments, the trial court precluded evidence of the total costs of remediation measures statewide, limited any discussion of costs to a per-mile and per-project basis, limited the amount of discussion of remediation measures, and gave the Sayers considerable leeway during cross-examination. Although the court did not make explicit findings that balanced the probative value of the evidence against the risks of unfair prejudice, misleading the jury, and confusing the issues, it is apparent from the transcripts that the court balanced the factors and concluded the

evidence was admissible. *See Salt River Project Agricultural Improvement and Power Dist. v. Miller Park, L.L.C.*, 218 Ariz. 246, ¶¶ 17-18, 183 P.3d 497, 501 (2008) (although desirable for trial court to make record of Rule 403 determinations, failure to do so is not necessarily reversible error). Given the court's consideration of both parties' arguments, and the limitations it placed on testimony to reduce confusion and prejudicial effect, the court did not abuse its discretion.

¶15 Finally, the Sayers argue that the evidence about the state's efforts in elk remediation on other roads and at other locations on SR 260 constituted inadmissible evidence of good character under Rule 404(b), Ariz. R. Evid. When evidence of other acts is offered for a non-character purpose, however, it may be admissible. *See Brown v. U.S. Fidelity and Guar. Co.*, 194 Ariz. 85, ¶ 16, 977 P.2d 807, 811 (App. 1998). Here, as noted above, the evidence was relevant to whether the state acted reasonably with respect to the roadway at milepost 253.8. The trial court did not err in admitting this evidence over the objection based on Rule 404(b).

Disposition

¶16 For the foregoing reasons, the judgment is affirmed.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge